

FEDERAL COURT OF AUSTRALIA

Menon v Minister for Immigration and Border Protection [2018] FCA 1497

Appeal from: *Menon v Minister for Immigration and Border Protection (No 2)* [2018] FCCA 897

File number: NSD 632 of 2018

Judge: **FLICK J**

Date of judgment: 5 October 2018

Catchwords: **MIGRATION** – refusal of spousal visa

ADMINISTRATIVE LAW – an opportunity to be heard – not an ongoing opportunity to continue supplementing evidence after decision – circumstances in which tribunal should allow party to re-open – circumstances in which adverse findings as to credit may be challenged on an application for judicial review

Legislation: *Migration Act 1958* (Cth) ss 5F, 359AA
Migration Regulations 1994 (Cth) reg 1.15A, Sch 2 cl 820.211, Sch 3 cl 3001

Cases cited: *AZU15 v Minister for Immigration and Border Protection* [2016] FCAFC 74, (2016) 240 FCR 143
CPW16 v Minister for Immigration and Border Protection [2017] FCA 1210
CQG15 v Minister for Immigration and Border Protection [2016] FCAFC 146, (2016) 253 FCR 496
Inspector-General in Bankruptcy v Bradshaw [2006] FCA 22
Legal Practitioner v Council of the Law Society of the ACT [2016] ACTCA 35, (2016) 311 FLR 108
Menon v Minister for Immigration and Border Protection [2016] FCCA 1708
Menon v Minister for Immigration and Border Protection (No 2) [2018] FCCA 897
Minister for Immigration and Border Protection v Dhillon [2014] FCAFC 157, (2014) 227 FCR 525
Minister for Immigration and Citizenship v SZRKT [2013] FCA 317, (2013) 212 FCR 99
Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11, (2002) 209 CLR 597

Re Confidential and Commissioner of Taxation [2013] AATA 382, (2013) 61 AAR 293
Re Gomez and Commonwealth (1988) 15 ALD 784
Re Kowalski and Military Rehabilitation and Compensation Commission [2007] AATA 1988, (2007) 47 AAR 300
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1, (2000) 58 ALD 609
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6, (2003) 214 CLR 1
Singh v Minister for Immigration and Border Protection [2017] FCAFC 220, (2017) 255 FCR 135
SZLGP v Minister for Immigration and Citizenship [2009] FCA 1470, (2009) 181 FCR 113
SZSHV v Minister for Immigration and Border Protection [2014] FCA 253

Date of hearing:	25 July 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	48
Counsel for the Appellant:	The Appellant appeared in person
Solicitor for the First Respondent:	Ms C Saunders of DLA Piper
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice, save as to costs

ORDERS

NSD 632 of 2018

BETWEEN: **SANDEEP MENON**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **FLICK J**

DATE OF ORDER: **5 OCTOBER 2018**

THE COURT ORDERS THAT:

1. 1. The appeal is dismissed.
2. 2. The Appellant is to pay the costs of the First Respondent, either as agreed or assessed.
- 3.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

1 The present Appellant, Mr Sandeep Menon, is a citizen of India who arrived in Australia on a student visa in 2009.

2 On 20 June 2013, he applied for a Partner visa. A delegate of the Minister for Immigration and Border Protection refused that application in January 2015. That decision was affirmed by the Administrative Appeals Tribunal (the “Tribunal”). An application filed with the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision, however, resulted in the Tribunal’s decision being set aside: *Menon v Minister for Immigration and Border Protection* [2016] FCCA 1708. The matter was remitted to the Tribunal for reconsideration.

3 In 18 January 2017, the Tribunal (differently constituted) again affirmed the delegate’s decision to refuse the Partner (Temporary) (class UK) visa. The Tribunal was not satisfied (*inter alia*) that Mr Menon and his sponsoring wife (Ms Natasha Jones) had “*a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing*”. An application filed with the Federal Circuit Court in February 2017 to review the January 2017 decision of the Tribunal was unsuccessful. The application was dismissed: *Menon v Minister for Immigration and Border Protection (No 2)* [2018] FCCA 897.

4 A *Notice of Appeal* was filed in this Court in April 2018.

5 The matter came before this Court for a Case Management Hearing on 12 July 2018 when the Appellant appeared unrepresented. The opportunity was then nevertheless taken to expose, for the future consideration of Mr Menon, some of the difficulties then experienced with respect to the *Grounds of Appeal*. Notwithstanding that elaboration of the difficulties presented, Mr Menon chose not to file or seek to file any *Amended Notice of Appeal*. He did, however, file an affidavit which was treated as a submission.

6 The appeal came on for hearing on 25 July 2018. The Appellant was again unrepresented; the Respondent Minister was represented by his solicitor.

7 The appeal is to be dismissed with costs.

Husband & wife – the Migration Act 1958 (Cth) and Migration Regulations 1994 (Cth)

8 To be eligible and to qualify for the visa for which he had applied in June 2013, Mr Menon had to satisfy cl 820.211(2) of Sch 2 to the *Migration Regulations 1994 (Cth)*. That clause provided in relevant part as follows:

820.21—Criteria to be satisfied at time of application

820.211

...

- (2) An applicant meets the requirements of this subclause if:
 - (a) the applicant is the spouse or de facto partner of a person who:
 - (i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and
 - (ii) is not prohibited by subclause (2B) from being a sponsoring partner; and
 - ...
 - (d) in the case of an applicant who is not the holder of a substantive visa—either:
 - (i) ...; or
 - (ii) the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.

9 Section 5F of the *Migration Act 1958 (Cth)* at the relevant time defined the term “*spouse*” as follows:

Spouse

- (1) For the purposes of this Act, a person is the ***spouse*** of another person if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a ***married relationship*** if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a husband and wife to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

10 10 Regulation 1.15A of the *Migration Regulations* provided in relevant part as follows:

Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

...

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

Clause 3001 of Sch 3 to the *Migration Regulations* should also be mentioned. That clause relevantly provided as follows:

Additional criteria applicable to unlawful non-citizens and certain bridging visa holders

3001 (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).

The Tribunal's decision – adverse assessments as to credit

The January 2017 decision of the Tribunal is based in significant part on adverse assessments as to the credit of both Mr Menon and Ms Jones.

Although findings as to credit are the function of the primary decision-maker “*par excellence*” (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1 at [67], (2000) 58 ALD 609 at 625 per McHugh J), such findings “*do not shield [a] decision-making process from scrutiny*”: *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31]. Credibility findings remain “*findings of fact the same as any other fact*”: *CPW16 v Minister for Immigration and Border Protection* [2017] FCA 1210 at [15]. Although this Court is necessarily forever conscious of the need to confine its scrutiny to the correction of legal error as opposed to impermissibly immersing itself in the factual merit of a decision, findings as to credit may potentially give rise to jurisdictional error in a variety of circumstances, including:

- where an adverse assessment as to credit has been made by reference to a materially false factual premise concerning a critical document: cf. *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470 at [34] to [45], (2009) 181 FCR 113 at 124 to 128 per Logan J;
- where an adverse finding as to credit has been made “*on an objectively minor matter of fact*” but that finding is nevertheless “*the basis for a tribunal’s rejection of the entirety of an applicant’s evidence and the entirety of the applicant’s claim*”: cf. *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [78], (2013) 212 FCR 99 at 121 per Robertson J; and
- where “*blanket, reflex or exaggerated adverse credit findings*” have taken the place of a “*proper examination of ... claims*”: cf. *AZU15 v Minister for Immigration and Border Protection* [2016] FCAFC 74 at [11], (2016) 240 FCR 143 at 145 per Allsop CJ, Kenny and Bromwich JJ.

14 14 Expressed differently, in *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146, (2016) 253 FCR 496 at 508 to 509, McKerracher, Griffiths and Rangiah JJ observed:

[38] There are several other potential bases upon which credit findings can be challenged. Recitation of the expression that credibility is a matter *par excellence* should not be understood as precluding challenges to credibility or, indeed, other findings of fact on any basis. While there is no suggestion in this case that this is what has occurred, the frequency of adoption of the expression should not obscure the availability of challenges on recognised grounds, such as:

- (a) failure to afford procedural fairness;
- (b) reaching a finding without any logical or probative basis;
- (c) unreasonableness; and/or
- (d) jurisdictional error as discussed by Flick J in *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451.

15 15 In the present case, the Tribunal made a series of adverse findings as to credit, including that:

- 3 • neither Mr Menon nor Ms Jones were “*credible at the hearing*” (at para [13]). The Tribunal went on to explain this finding by reference to its assessment that “*Mr Menon adjusted his evidence upon questioning and the parties’ evidence was inconsistent*”. The inconsistencies were then identified;
- 4 • it was “*not prepared to accept that the parties have ever lived together given the inconsistencies in their oral evidence*” and that certain “*evidence was unconvincing*” (at para [27]);
- 5 • there was a “*discrepancy*” in an account as to where Mr Menon and Ms Jones stayed after a birthday party and that that “*discrepancy was [not] due to miscommunication as Mr Menon claimed*” (at para [35]);
- 6 • it was “*troubled about the parties’ lack of knowledge about one another at the hearing*” (at para [40]); and
- 7 • Mr Menon and Ms Jones “*gave inconsistent oral evidence regarding whether or not Samuel is currently attending child care*” (at para [41]).

Each of these findings contributed to the ultimate conclusion of the Tribunal that it was “*not satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others*” (at para [45]).

Each of the adverse credit findings made by the Tribunal were open to it and none expose legal error susceptible of being impugned by the Federal Circuit Court or this Court.

The Tribunal's decision – its finding as to “mutual commitment”

The Tribunal's ultimate finding as to the absence of “*a mutual commitment to a shared life as husband and wife*” was a finding dictated by its adverse findings in respect to the criteria set forth in reg 1.15A(3) of the *Migration Regulations*.

In reaching its ultimate finding, the Tribunal had previously set forth its separate consideration of:

- the financial aspects of the relationship, concluding that the “*financial aspects of the relationship are not consistent with Mr Menon and Ms Jones being in a genuine and continuing spousal relationship at any time*” (at para [24]);
- the nature of the household, concluding again that the “*evidence presented as to the nature of the parties' household is not consistent with Mr Menon and Ms Jones being in a genuine and continuing relationship at any time*” (at para [29]);
- the social aspects of the relationship, concluding that it was “*not satisfied that Mr Menon and Ms Jones represent themselves to other people as being married to each other or plan or undertake joint social activities*” (at para [37]); and
- the nature of the persons' commitment to each other, concluding that “[*t*]*here is limited independent evidence of any commitment to the relationship by either party*” and that it was “*not prepared to accept that Mr Menon and Ms Jones provide one another with emotional support or that they see the relationship as long-term*” (at para [44]).

When considering the nature of the commitment of Mr Menon and Ms Jones to each other, the Tribunal gave consideration to a claim that Mr Menon was the biological father of a son (Samuel) born to Ms Jones in December 2013. The Tribunal had written to Mr Menon in December 2016 inviting him to provide DNA evidence of the claimed biological relationship. But that invitation was declined on behalf of Mr Menon by his migration agent in January 2017. The reasons of the Tribunal include the following:

Nature of the persons' commitment to each other

38. The parties claimed that Samuel is Mr Menon's son and said that he was busy at work when Ms Jones lodged the application for Samuel's first birth certificate. That evidence was unconvincing given the social and legal importance of being

recognised as the parent of a child. Mr Menon told the Tribunal that he was prepared to undergo a DNA test. Ms Jones stated that she has no doubt whatsoever that Samuel is Mr Menon's biological child. Mr Menon and Ms Jones gave a consistent account of Samuel's birth and the Tribunal accepts that Mr Menon attended the hospital for the birth as stated. The Tribunal notes that there is a physical resemblance between Mr Menon and Samuel.

39. Samuel's first birth certificate was issued on 14 January 2014 and the second on 19 May 2015. The Tribunal offered Mr Menon an opportunity to provide DNA evidence of the claimed biological relationship between him and Samuel, however; Mr Menon declined the invitation. The Tribunal has taken into account the inconsistencies in the parties' oral evidence, the fact that Samuel's first birth certificate did not refer to Mr Menon as the father and Mr Menon's decision not to undertake a DNA test, and is not prepared to accept that Mr Menon is Samuel's father as claimed.

Each of these findings, it is respectfully considered, was open to the Tribunal by reference to the evidence which was before the Tribunal and is referred to in respect to each finding.

- 19 19 The Tribunal completed its decision by reference to cl 3001 of Sch 3 to the *Migration Regulations*. In doing so, it expressed the following conclusions:

Schedule 3 criteria

47. It is not in dispute that Mr Menon was not a substantive visa holder at the time of application and had not made an application within 28 days of the date of his last substantive visa. Thus, he did not meet criterion 3001 and would have to satisfy the Tribunal that there were compelling reasons not to apply the Schedule 3 criteria.
48. Mr Menon submitted that there are a number of compelling reasons in his case for not applying the Schedule 3 criteria. These include the length of the parties' relationship, the claim that the parties' have an Australian citizen child, Ms Jones was unwell after Samuel's birth and Mr Menon has not breached any visa conditions. However, it is not necessary for the Tribunal to consider whether the reasons submitted are compelling reasons for not applying the Schedule 3 criteria as the Tribunal has found that Mr Menon has not met an essential criterion for the visa, that is, cl.820.221.

The decision of the Federal Circuit Court & the Grounds of Appeal

- 20 20 Before the Federal Circuit Court the now Appellant relied upon a single *Ground of Review*, namely:

The Administrative Appeal Tribunal made a jurisdictional error in denying the Applicant's application for a Partner (Temporary) (Class UK) visa in failing to consider all the facts and the law related to the Applicant's application particularly:

"Particulars" were thereafter set forth.

- 21 21 Before that Court, Mr Menon was unrepresented and appeared in person.

- 22 22 The reasons for decision of the Federal Circuit Court record Mr Menon as having made no submissions in relation to this *Ground*: [2018] FCCA 897 at [15]. The primary

Judge nevertheless went on to consider the *Ground* and the *Particulars* provided. That Judge concluded that the *Ground* exposed no jurisdictional error: [2018] FCCA 897 at [16] to [18]. The Tribunal carefully and separately considered each of the “*matters*” set forth in reg 1.15A(3) of the *Migration Regulations*. Each of the findings made by the Tribunal in respect to each of the four “*matters*” set forth in reg 1.15A(3) were findings open to be made. The primary Judge also went on to separately consider Mr Menon’s submission that “*he was not given an opportunity to present documents to support his claims*” and that Mr Menon wanted “*the matter to be returned to the Tribunal to give the applicant a further opportunity to put before the Tribunal additional documents, including DNA evidence*”: [2018] FCCA 897 at [17].

23 23 The *Notice of Appeal* as filed in this Court in April 2018 sets forth the *Grounds of Appeal* as follows (without alteration):

1. The Hon. Federal Circuit Court judge made legal error by not considering grounds of my Judicial Review application where the Administrative Appeals Tribunal (AAT) made legal error.
2. The Hon. Federal Circuit judge made legal error by not properly considering that the tribunal failed to comply with the natural justice provision of the Migration Act-1958.
3. The Hon. Federal Circuit Court judge made legal error by not considering the Administrative Appeals Tribunal decision in which AAT has not assessed evidence that the Appellant has not met an schedule 3 essential criterion for the visa.
4. The Administrative appeal Tribunal has considered the information which was not before it and come to irrational conclusion.

24 24 Albeit expressed in different terms to the *Ground* as set forth in the *Originating Application* filed in the Federal Circuit Court, the now separately identified four *Grounds of Appeal* may be construed as largely addressing the same issues as were addressed by the primary Judge.

25 25 Some difficulty is nevertheless expressed in respect to the first *Ground of Appeal*. Before the Federal Circuit Court the reasons of the primary Judge record that “*no submissions*” were made in respect to the then sole *Ground of Review* relied upon: [2018] FCCA 897 at [15]. The primary Judge, however, went on to consider and resolve the *Ground of Review*. The primary Judge, moreover, had previously set forth the findings made by the Tribunal. In doing so, the primary Judge thereby explored the reasoning of the Tribunal in order to consider whether legal error was exposed in the course of making those findings.

26 No appellable error is discernible in the manner in which these issues were resolved.
The first *Ground of Appeal* is rejected.

27 The second *Ground of Appeal* was, it has been assumed, directed to the reasoning of
the primary Judge and the conclusion that there was nothing to suggest that Mr Menon had
not been given “a fair opportunity to present to the Tribunal such evidence as was available
to the applicant to provide to it”: [2018] FCCA 897 at [17]. The manner in which Mr Menon
sought to argue that the Tribunal had “failed to comply with the natural justice provision” was
not identified with any degree of precision. As noted by the primary Judge, however,
Mr Menon apparently submitted before that Court that he wanted the matter remitted to the
Tribunal so that he could adduce “additional documents, including DNA evidence”.

28 Although Mr Menon had difficulty in seeking to develop his *Grounds of Appeal*
before this Court, it was understood that his principal (if not his only) concern was that he
now wished to have an opportunity to present for consideration DNA evidence.

29 If such a proposition were accepted, the consequence – it is respectfully considered –
would be truly disturbing.

30 Mr Menon was invited to attend a hearing before the Administrative Appeals Tribunal
by way of a letter dated 31 October 2016. That letter was forwarded to Mr Menon’s
registered migration agent. Mr Menon provided a response to the hearing invitation dated 4
November 2016 and accepted the invitation to attend. By letter dated 6 December 2016, the
agent forwarded to the Tribunal documents for its “*kind consideration*”, being:

- 12 • bank statements;
- 13 • photos;
- 14 • a series of statements and payment receipts provided by the Commonwealth;
- 15 • a residential tenancy agreement in the names of both Mr Menon and Ms Jones
(and another);
- 16 • reference letters; and
- 17 • other “*Supporting Documents*”, including details of car insurance in the names
of both Mr Menon and Ms Jones.

The hearing thereafter took place on 15 December 2016 at which time Mr Menon was
represented by his registered migration agent.

- 31 31 The invitation to attend the hearing was required to be given by reason of s 360(1) of the *Migration Act*. That sub-section required an invitation to be extended “*to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review*”. The purpose of such a hearing is to ensure that an applicant “*is given a proper opportunity to present his or her case*”: *Minister for Immigration and Border Protection v Dhillon* [2014] FCAFC 157 at [22], (2014) 227 FCR 525 at 540 per Allsop CJ, Murphy and Pagone JJ (“*Dhillon*”). See also: *Singh v Minister for Immigration and Border Protection* [2017] FCAFC 220 at [54], (2017) 255 FCR 135 at 143 per Tracey, Mortimer and Moshinsky JJ.
- 32 32 The opportunity to be heard that was extended to Mr Menon by the Tribunal was an opportunity for Mr Menon to produce at the hearing on 15 December 2016 – or within such further time as the Tribunal may permit – such documents and other materials as he then wished to rely upon. It was not an ongoing opportunity which Mr Menon could avail himself of even after the decision has been made by the Tribunal. Mr Menon has been afforded the benefit of a hearing before the Tribunal and the benefit thereafter of a Tribunal decision. There is no entitlement for Mr Menon, or any other party, to be afforded a further opportunity to thereafter adduce further evidence with a view to bolstering claims previously made with a view to persuading the Tribunal to reconsider its earlier decision and possibly reach a further and different decision. If that were the case, there would be no end to the Tribunal’s deliberations.
- 33 33 With specific reference to the further opportunity now sought by Mr Menon to adduce DNA evidence, such an orthodox approach to the nature of the opportunity to be heard as has been taken in the present case gives rise to no “*practical injustice*”: cf. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6 at [37], (2003) 214 CLR 1 at 13 to 14 per Gleeson CJ. On the facts presented, the Tribunal wrote to Mr Menon on 16 December 2016 “*offering [him] the opportunity to provide DNA evidence of the claimed biological relationship between Mr Sandeep Menon and Master Samuel Colin Jones*”. Mr Menon completed a form, which was dated 5 January 2017, declining the invitation. That form stated next to a box which had been checked:

I do not intend to provide the AAT with DNA evidence and understand that the AAT will make its decision on the basis of the information available to the AAT at the time of the decision.

The Tribunal proceeded to make its decision and give reasons on 18 January 2017, which were sent to Mr Menon by letter dated 19 January 2017.

34 34 Before this Court, Mr Menon submitted that he had informed the Tribunal of his inability to afford the costs involved in obtaining the DNA evidence and that he had requested further time in which to provide the evidence. But there is no evidence of any such request having been made. The submission is rejected. Before signing the form on 5 January 2017, Mr Menon accepted before this Court that he had both read and understood the election he was then making not to adduce DNA evidence. There is no reason to go behind the acknowledgment then made by Mr Menon as to his understanding. Assuming that the Tribunal possessed a power to permit a party to re-open his case and adduce further evidence after a decision has been published, the exercise of any such discretionary power would presumably be a discretion at least guided by reference to “*the interests of justice*”: cf. *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24] per Kenny J. It is difficult to see how any such “*interests*” would be served in the present case where Mr Menon was expressly invited to submit the further evidence and expressly declined that invitation.

35 35 Not being a body bound by the rules of evidence, it may be noted that the Tribunal has itself asserted “*an unfettered discretion to allow the introduction of further evidence*” and a discretion not bound by the need “*to satisfy a court’s requirement for the introduction of fresh evidence*” but a discretion which would nevertheless not be exercised to allow the introduction of further evidence if a party “*had deliberately refrained from tendering the evidence at the hearing to obtain some forensic advantage*”: *Re Kowalski and Military Rehabilitation and Compensation Commission* [2007] AATA 1988 at [35] to [36], (2007) 47 AAR 300 at 312. In *Re Gomez and Commonwealth* (1988) 15 ALD 784 the Tribunal similarly observed that a matter before the Tribunal should not be reopened “*where evidence had been deliberately withheld*”. Before the Tribunal, as before a Court, there is a comparable “*public interest in finality in litigation*”: *Re Confidential and Commissioner of Taxation* [2013] AATA 382 at [116], (2013) 61 AAR 293 at 318. In circumstances where an administrative tribunal is bound by the rules of natural justice but nevertheless proceeds to make a decision or a recommendation which is rendered a nullity for a failure to comply with those rules, it may be permitted to reopen: cf. *Legal Practitioner v Council of the Law Society of the ACT* [2016] ACTCA 35 at [79], (2016) 311 FLR 108 at 132 per Burns and

Rangiah JJ. See also: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, (2002) 209 CLR 597.

It is, however, unnecessary in the present case to pursue further the outer limits of any discretion vested in the Tribunal to re-open. Even before it published its decision, it would be at least open to question whether the Tribunal would have erred had it denied Mr Menon an opportunity to adduce DNA evidence had he belatedly changed his mind after having previously deliberately elected not to adduce such DNA evidence; after the Tribunal had published its decision, the position is even clearer. There is no self-evident basis upon which the Tribunal could have reached a conclusion that its prior decision-making process was a nullity such that it should go back and revisit that which it had already done.

Mr Menon further submitted that the consideration given by the Tribunal to the absence of DNA evidence was the sole reason for its adverse decision. That submission is also rejected. Albeit an important part of the Tribunal's reasoning process, paras [38] and [39] of its reasons provide but one part of a consideration given by the Tribunal to each of the four "*matters*" set forth in reg 1.15A(3) of the *Migration Regulations*.

There is no reason, with respect, to question the adequacy of the hearing extended to Mr Menon. The hearing on 15 December 2016 was "*a proper opportunity to present his ... case*": cf. *Dhillon* [2014] FCAFC 157 at [22], (2014) 227 FCR 525 at 540 per Allsop CJ, Murphy and Pagone JJ.

A potential argument that may have been advanced by Mr Menon, albeit not an argument which was apparently advanced before the primary Judge, was a failure to comply with s 359AA of the *Migration Act*. But such an argument would have met with no greater success. The Tribunal was clearly alive to the requirements imposed by s 359AA and its reasons thus disclose and separately identify the "*inconsistencies*" in the account being provided.

The primary Judge was correct to conclude that the Tribunal had not denied Mr Menon "*an opportunity to present documents*".

The second *Ground of Appeal* is rejected.

The third *Ground of Appeal* does not identify what "*evidence*" was not assessed by the Tribunal nor the "*schedule 3 essential criterion*" to which reference is made. A similar difficulty, it may be noted, was expressed by the primary Judge when he observed that the

sole *Ground of Review* then relied upon did “*not identify the facts or law the Tribunal is said not to have considered*”: [2018] FCCA 897 at [16]. Working within that constraint, there is no self-evident claim (or evidence) relied upon by Mr Menon before the Tribunal which was not considered.

43 Nor is there any self-evident failure on the part of either the Tribunal or the primary Judge to “*assess*” any “*schedule 3 ... criterion*”, “*essential*” or not. The second of the *Particulars* set forth in the *Ground of Review* before the Federal Circuit Court, however, refers to “*criterion 3001*” of Sch 3 to the *Migration Regulations*. The Tribunal expressed its conclusion at para [48] of its reasons, namely that it was not necessary to consider whether Mr Menon had shown “*compelling reasons*” because of its earlier conclusion that he did not satisfy cl 820.221. No error on the part of the Tribunal is thereby exposed. Resolution of the application of cl 3001 was not required. The primary Judge was correct in concluding that no “*jurisdictional error*” is disclosed: [2018] FCCA 897 at [16].

44 The third *Ground of Appeal* is rejected.

45 The final *Ground of Appeal* is a ground flawed by the fact that it advances no error said to have been committed by the primary Judge; it is a *Ground* which seeks to challenge the findings made by the Tribunal. For that reason alone it should be dismissed. Nor does it readily appear to be a *Ground* that was argued before the primary Judge, except in the most general sense that it was there claimed that the Tribunal’s decision had failed to consider all of the facts. The *Ground*, moreover, fails to identify the “*information*” which it is claimed “*was not before it*”. If reference is made to such evidence and materials as were before the Tribunal, and the findings made by the Tribunal, the decision of the Tribunal was one which in no sense could be characterised as “*irrational*”. To the extent that the final *Ground of Appeal* seeks to re-agitate the submissions made in respect to the further opportunity sought to adduce DNA evidence, that argument has been rejected.

46 The final *Ground of Appeal* is rejected.

CONCLUSIONS

47 The ultimate decision reached by the Tribunal was one dictated by the adverse findings as to credit which had been made and by the Tribunal’s assessment of the evidence and other materials before it.

48 48 The primary Judge was correct in dismissing the *Originating Application* filed in that Court.

THE ORDERS OF THE COURT ARE:

1. 1. The appeal is dismissed.
2. 2. The Appellant is to pay the costs of the First Respondent, either as agreed or assessed.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 5 October 2018